

December 31. 1767.

A N S W E R S

F O R

JAMES CHALMERS merchant in Leith,



T O

The PETITION of David Loch merchant in Leith.

AS the petition for James Muirhead, and the petition for David Loch, will be advised by your Lordships at the same time; and as the facts which gave rise to the question betwixt these parties, and the procedure in the different actions that hath occurred, are stated at full length in the answers to the petition for James Muirhead; it will be unnecessary again to resume them; and therefore the respondent shall now confine himself to a few observations upon what is stated in Mr Loch's petition.

It will only be necessary to observe, in point of fact, that after the Lord Ordinary had refused Muirhead's ninth representation, by his interlocutor of the 24th July 1767, an advocacy of the process that depended before the sheriff at the instance of this petitioner, against James Muirhead, for exhibition of the writs and title-deeds of the tenement, was obtained; and a multiple-poin ding was raised in the name of the tenants; and this petitioner thought proper to enter a compearance for his interest before the Lord Justice-Clerk; and in August last he preferred a representation to his Lordship, setting forth the bargain he

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had made with James Anderson ropemaker, the son of Thomas Anderson, and the action he had brought before the sheriff against Muirhead, and the advocacy which he had obtained of that process, with the multiple-poining that had been raised in the name of the tenants : and he prayed his Lordship to allow the petitioner's interest to be received, and to stop extract in the process at the respondent's instance against Muirhead, until the foresaid process of advocacy and multiple-poining can come in by course of the rolls, and the petitioner heard for his interest.

Aug. 10. 1767 And the Lord Ordinary, of this date, pronounced the following interlocutor : " Having considered this representation, refuses " the desire thereof, and adheres to the former interlocutors."

The petitioner thereupon preferred a second representation, in which he prays the Lord Ordinary to alter the above-mentioned interlocutors ; And, " *1mo*, to find, That as there was no " counter-obligation granted by Mr Chalmers when he obtained the missive from Muirhead, the bargain was not effectual. " *2do*, At any rate to find, That Mr Chalmers has no title to " demand any direct disposition from Muirhead, whatever claim " he may have against him for damages." And the Lord Ordinary,

Nov. 23. 1767 of this date, pronounced the following interlocutor : " Having considered this representation ; in regard it is therein admitted, that the sale of the tenement in question, by James " Muirhead, to Thomas Anderson, was redeemable, and the " price never paid ; and that Muirhead, with consent of Anderson, did afterwards sell the subject to Chalmers ; and that " the disposition by Muirhead to Anderson was delivered back " to Muirhead, in order to his completing the second sale ; and " thereupon the possession of the subjects was given up by Anderson ; finds, That the first sale to Anderson was thereby " vacated, and that the heir of Anderson had no right or title " whatever to convey the subject to this representer : and therefore refuses the desire of this representation, and adheres to " the former interlocutor."

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Mr Loch has reclaimed to your Lordships; the petition is ordained to be seen and answered; and in obedience thereto, this is humbly offered on behalf of the respondent.

The petition prays your Lordships to find, That Mr Chalmers has no title to compete for the tenement upon the missive granted to him by Muirhead, as no counter-obligation was granted, and as the missive was not *in terminis* implemented by Mr Chalmers: Or, *2do*, To find, That Mr Chalmers has no right to demand any direct disposition from Muirhead, whatever claim he may have against him for damages.

With respect to the second prayer of the petition, the respondent cannot conceive upon what principle of law the demand is founded: for although the tenement in question had been conveyed to Thomas Anderson, and that the disposition was a subsisting deed at this day; yet it could afford no objection to the interlocutors pronounced by the Lord Ordinary, "finding James Muirhead liable to grant to James Chalmers a " valid disposition of the subjects."

For if James Muirhead had come under a valid obligation to convey the subjects to the respondent, it could afford no defence to him against implementing his obligation, that he had formerly come under a like obligation to a third party: for although he could not give specific implement to both; yet being debtor to both, each would be intitled to insist against him for specific implement, and to demand a judgement against him for that effect, that they might be enabled to complete their titles by an adjudication in implement. And if it would not be competent to Muirhead himself to object to such decree being obtained against him, neither will it be competent to this petitioner to make such objection. If this petitioner's author had a good personal right to the subject, he may proceed to complete his titles by legal diligence; and in like manner the respondent is intitled to proceed, and to complete his right by legal diligence; and he who shall attain the first complete right, will, in a competition, be preferred.

ferred to the possession of the subject. But neither of them could object to the other's obtaining a personal decerniture against their debtor for implement of the obligation which he had come under.

But, *2do*, The respondent humbly apprehends, that, in the present case, the petitioner has no right or title whatever to compete with the respondent; because, *1mo*, No title hath been produced in the person of James Anderson, the petitioner's author, to the disposition that is said to have been granted by James Muirhead to Thomas Anderson; and, *2do*, It is extremely clear, that if ever the sale by James Muirhead to Thomas Anderson was a finished transaction, it was afterwards departed from.

The disposition by Muirhead to Anderson was in Muirhead's hands, and was given up by him to Walter Ferguson, the respondent's doer, very long after the date of the bargain. And the respondent does aver, and, if denied, does offer to prove, that the bill that was accepted by Anderson for the price, is to this day in the possession of his widow. And indeed it was admitted by the petitioner, in his second representation to the Lord Ordinary, that the tenement in question was redeemable by James Muirhead from Anderson; that the price was never paid; and that Muirhead, with Anderson's consent, had afterwards sold the subjects to the respondent; and that the disposition by Muirhead to Anderson was delivered back to Muirhead. And when that is the case, it is, with submission, inconceivable how this petitioner can pretend to set up any claim to the subjects upon a right flowing from no other person than Anderson's heir.

The petitioner says, That if the right was once conveyed by Muirhead to Anderson, he could only be divested by redispensing the subject.

But, in the *first* place, there is no evidence that ever the disposition was a delivered evident in favour of Anderson. Muirhead did frequently aver, in the course of the proceedings, that the

the disposition to Anderson was never delivered. But, *2do*, It is of no moment whether it was delivered or not; because it is clear, from the facts above stated, that if the transaction was ever completed, it was departed from; and there can be no doubt, that where no infeftment hath followed, a transaction of this kind can be effectually vacated, by retiring the deeds which were mutually granted *hinc inde*.

The petitioner says, That the obligation granted by Muirhead to the respondent, was not binding even upon Muirhead, as there was no counter-obligation granted by the respondent to Muirhead; and that in all mutual contracts it is an established rule, that both parties must be bound, or neither.

In the *first* place, as it hath been already shown, that the transaction betwixt Muirhead and Anderson, if ever it was completed, hath been effectually passed from; and as the title upon which the petitioner claims, flows only from the heir of Anderson; this petitioner hath neither title nor interest to insist upon the objection. *2do*, Were it competent, the respondent, in his answers to Muirhead's petition, and which shall not now be repeated, hath endeavoured to show, and he hopes to your Lordships satisfaction, that the obligation is binding and effectual; and that no solid objection does lie against it.

Indeed the question is not now entire: it is determined by a judgement of your Lordships, which has become final. For in the process originally brought at the respondent's instance against Muirhead, before the sheriff, for implement of the obligation, the objection that is now pleaded was moved against it, and was over-ruled; and Muirhead having complained by bill of advocacy, the Lord Prestongrange Ordinary refused the bill; and upon advising petition and answers, your Lordships, of this date, *Aug. 9. 1759.* adhered: So that the validity of the obligation having been established by a *res judicata* of this court, the question cannot again be brought under review.

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The petitioner says, That although this was to be held as a *res judicata* against Muirhead, yet it cannot bind the petitioner, who was no party to that action.

But, with submission, this can afford no objection to the judgement; nor will it intitle the petitioner to overhaul the judgement, and have the question tried of new; because the judgement was pronounced betwixt the persons who alone fell to be made parties to the action. The action in which the judgement was pronounced, was a personal action, at the instance of the respondent, against Muirhead, to implement an obligation that he had come under, and as no other person fell to be made a party to that action, it must be binding against Muirhead, and against every person who may come to claim in his right.

This question is precisely similar to what occurs every day in the case of rankings and competitions among creditors. If a creditor has constituted his claim against his debtor by a decret *in foro*, when he comes to claim upon this decret, and the diligence following upon it, it would not be competent to the competing creditors to object, that the judgement was erroneous, and that it was not binding upon them, as not having been parties to it. If it was *bona fide* obtained, without fraud or collusion, the decree will have full effect: and if the creditor has, in virtue of it, attached the estate of his debtor prior to the other creditors, he will be preferred to them accordingly. And for the same reason the judgement that was pronounced in this case, as it must be effectual, to all intents and purposes, against Muirhead himself, it must likewise be effectual against his creditors, and particularly against this petitioner, who pretends to claim in the right of a disposition alledged to have been granted by Muirhead to Anderson.

The petitioner further says, That no action can lie upon this missive at the instance of the respondent, in regard the transaction was not implemented upon his part.

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This objection has likewise been sufficiently obviated in the answers to Muirhead's petition; and which therefore shall not be repeated. And besides, for the reasons already given, this petitioner, who only derives right from the heir of Anderson, has neither title nor interest to make the objection; as it has been already shown, that the bargain betwixt Muirhead and Anderson, if ever it was completed, has been effectually passed from.

The petitioner is pleased to consider himself in this case as a *bona fide* purchaser of the subject from Anderson; but upon what ground he can support his *bona fides*, it is not easy to discover, when he makes the purchase from a person who never had been in the possession of the subjects, who appears to have no right from the records, and who could not produce a scrap of paper to show that he had the shadow of a title.

As it is impossible to believe, that any person would have thought of making a purchase from a person under these circumstances, so the petitioner hath acknowledged, in the petition, that he was to pay no money for the purchase; but that it was conveyed to him in satisfaction of a former debt: which is saying, in other words, that he was taking a law-plea for his payment, as the petitioner cannot deny, that he knew of the dispute betwixt Muirhead and the respondent before he made the bargain with James Anderson in the month of May last.

The petitioner has not thought proper to inform your Lordships of the extent of the debt which Anderson owes him, nor of the date of the contraction; but the respondent has good reason to believe, that any debt which Anderson owes the petitioner, must not only be greatly below the value of the tenement in question, but that it must be of a pretty old contraction; because Anderson's circumstances never were such that the petitioner would have given him credit for a sum nearly equal to the value of this tenement; and

and it is more than twelve years since Anderson became bankrupt, and has never since been in the way of having either money or credit.

Upon the whole, the respondent humbly hopes, that your Lordships will have no difficulty to refuse both petitions, and adhere to the interlocutors of the Lord Ordinary.

In respect whereof, &c.

RO. MACQUEEN.

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